D & C NOMURA MERCHANT BANKERS LTD.

v.

FUTURA ENGINEERING SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[COMPANIES WINDING-UP NO. D2-42-410-87]
30 MAY 1989

COMPANY LAW: *Winding-up petition - Payments made not taken into account - Non-disclosure of payment in statutory notice and petition - Whether prejudice to respondent.*

Petitioner petitioned to wind up the respondent pursuant to a judgment in default entered against the respondent as guarantor. At the hearing, objection was taken by the respondent on the basis that the amount stated to be due both in the statutory notice and petition had not taken into account payment already made by principal borrower and not reflected in both the notice and petition.

Payment made are not disputed by the petitioner but they claimed that such payment have not materially effected the sum that is due from the respondent as guarantor.

Held:
Since the monthly instalments made by the principal borrower have not reduced the amount due from the respondent, the non-disclosure of such payment in the notice and petition has not prejudiced the respondent in anyway.

[Winding-up petition allowed.]

Case referred to:
Tweeds Garages Ltd. [1962] 1 All ER 121

Legislation referred to:
Companies Act 1965, s. 219(2)

For the respondent/applicant - P.C. Choong; M/s. Choong & Co.
For the petitioner/respondent - S.M. Yoong; M/s. Shook Lin & Bok

JUDGMENT

Siti Norma Yaakob J:

At the hearing of this winding up petition, objection was taken by the respondent that the amount stated to be due both in the statutory notice, dated 17 June 1987 and the petition dated 8 September 1987 is wrong as the petitioner had not taken into account payments already made, since judgment was entered against the respondent. Under such circumstances, it was submitted that no winding up order can be entered against the respondent.

On 25 July 1986 judgment in default of appearance was entered against the respondent, who was sued as one of two guarantors, on facilities due from Gunung Kuari Sdn. Bhd., the principal borrower. The sum due from the principal borrower amounted to more than RM6 million and being one of two guarantors, the respondent's liability is limited to 50% of the amount due from the principle borrower.

Following the judgment in default the principal borrower has been making monthly instalments of varying amounts to the petitioner and up to the issue of the statutory notice dated 17 June 1987 the total instalments paid amounted to RM535,174.18. This, however, is not reflected in both the notice and the petition and for such omission the respondent maintains that no winding up should be entered against it.

The monthly instalment payments made by the principal borrower are not disputed by the petitioner, but the petitioner claims that such payments have not materially effected the sum that is due from the respondent as a guarantor as the total instalments paid up to be issue of the statutory notice and the petition have not even reduced the recurring monthly interests due much less the principal. Under such circumstances, can the non-disclosure of payments by monthly instalments in the statutory notice and the petition prejudice the respondent in any way as to prevent the petitioner obtaining the winding up order against the respondent?

I answer this is the negative for firstly the petitioner is a creditor to whom a sum of money as stated in the statutory notice and petition is due and owing from the respondent. As at the date of service of the statutory notice, the respondent had 21 days within which to pay up and when if failed to do so it has held itself out to be in the position of being unable to pay its debts. Under s. 219(2) of the Companies Act 1965 the winding up of the respondent is deemed to have been commenced at the time of the presentation of the petition on 8 September 1987. The petition came before me for the first time on 18 April 1988 but it was adjourned to 13 June 1988 then again to 29 August 1988 and 14 October 1988 at the requests of the respondent and at all these adjournments, the respondent never contested the petition, other than to try to have the judgment in default set aside for which it was not successful.

Since the monthly instalments made by the principal borrower have not reduced the amount due from the respondent, I do not consider the non-disclosure of such payments in the notice and petition has prejudiced the respondent in any way. It would have been different if the amount stated in the notice and petition is very much more than what is actually due, in which case these is a dispute as to the amount owed. In this case since the monthly instalments have not reduced the sum due from the respondent, it would appear that the sum stated in the notice and petition is actually less than what is due to the petitioner.

In this instance my attention was drawn to the case of *Re Tweeds Garages Ltd*. [1962] 1 All ER 121, where it was held that where there is no doubt that the petitioner is a creditor, for a sum which would otherwise entitle him to a winding up order, a dispute as to the precise sum which is owed to him is not of itself a sufficient answer to his petition. The fact that the amount involved in the English case is small is quite immaterial as what is in issue before me is whether the non-disclosure of the monthly instalments in the notice and petition had prejudiced the respondent in any way. I have already stated it does not, as the instalments paid did not reduce the amount that is stated in the notice and petition. On that ground, I had dismissed the respondent's objection and made a winding up order against it.

Also found at [1990] 1 CLJ 265